FILE COPY

No. 416.

Office Supreme C
FILE
NOV 5
JAMES H. McK

IN THE

SUPREME COURT OF THE UNITED STATES

SHROPSHIRE, WOODLIFF & CO., APPELLANT.

vs.

THOMAS G. BUSH, THOMAS A. GILLESPIE, and ORION L. HURLBUT, as Trustees of Southern Car & Foundry Co., Bankrupt, APPELLEES.

On Certificate from the United States Court of Appeals for the Sixth Circuit.

BRIEF AND ARGUMENT FOR APPELLEES

GEORGE D. LANCASTER,
for Appellees.

JOHN P. TILLMAN,
J. H. BEAL,
WILLIAMS & LANCASTER
of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

SHROPSHIRE, WOODLIFF & CO., APPELLANT

vs.

THOMAS G. BUSH, THOMAS A. GILLESPIE, and ORION L. HURLBUT, as Trustees of Southern Car & Foundry Co., Bankrupt, APPELLEES.

On Certificate from the United States Court of Appeals, for the Sixth Circuit.

BRIEF AND ARGUMENT FOR APPELLEES

I.

The question certified in the cause is this:

"Is an assignee of a claim for wages, earned within three months before the commencement of proceedings in bankruptcy against the bankrupt debtor, entitled to priority of payment, under section 64 (4), of the Bankrupt Act, when

the assignment occurred prior to the commencement of such bankruptcy proceedings?"

Section 64 of the Bankrupt Act is as follows:

Sec. 64. Debts Which Have Priority.—(a) The Court shall order the Trustee to pay all taxes legally due, etc.

(b) The debts to have priority, except as herein provided, and to be paid in full out of the bankrupt estate, and the order of payment shall be:

(1) The actual and necessary cost of preserving the estate subsequent to filing the petition;

(2) The filing fees paid by creditors in involuntary cases, etc.;

(3) The cost of administration, etc.;

(4) *Wages due to workmen, clerks or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant.*

What, then, is the meaning of this Sub-section Four, as applied to the state of facts given in the certificate in this cause?

It is admitted that, under this sub-section, priority is given to a limited extent to wages *due to workmen* at the date of the proceedings in bankruptcy, but is priority also given to wages *earned* by workmen but due, *not to them,* but to an assignee?

In the outset, we beg to call attention to the fact that this question has been answered in the negative by every Federal Court that, until now, has had occasion to pass upon it; that, until now, this answer has been taken as the accepted rule controlling the distribution of assets in bankruptcy cases; and that this conclusion has been adopted by every text book on the subject of our present Bankrupt Act.

It will be said, and correctly said, that this may be true, but it is not controlling. Nevertheless, it is at least persuasive, for, if the Courts, in ascertaining the meaning of language so simple, have with such unanimity been led into a

conclusion, the direct opposite of the real intent of Congress, it must be that our language is a very treacherous vehicle for thought, or the Courts themselves have been very unfortunate.

In discussing the question presented, it will be noticed that Counsel for Appellants do not catch hold of the actual words used in this sub-section, and endeavor to educe therefrom their real intent and meaning, nor do they attempt to ascertain this meaning by considering these words in the light of the purpose and spirit of the Bankrupt Act. On the contrary, Counsel have been pleased to content themselves with making an excursion into other fields and to garner there the information which is to guide and control us here.

It is doubtless true that, under the labor laws enacted by the legislatures of most of the states, the lien given in favor of the wages of workmen passes with the wages to an assignee; and, it may be true, that Congress should have done likewise when it enacted our present bankrupt law. But the question is not what the various states have done, nor what Congress might, could, would or should have done, but only this, what Congress *has done*.

The pith of Appellants' contention is that the purpose of this sub-section is to give priority "to the *claim* (of workmen) and not to the *claimant;*" that is to say, the intention is to give a special favor or privilege to the *debt* created by the workman because of the peculiar character of the *debt* and not to give a special favor or privilege to the workman himself because of the peculiar situation of the workman.

If in this Appellants be correct, it follows, of course, that the lien given to the debt passes with it to an assignee and the latter will be entitled to priority in its payment, notwithstanding that, at "the date of the proceedings in bankruptcy," the wages were not "due to workmen," as required by the express words of the Bankrupt Act.

II.

"As a general rule, the words of a statute, if of common use, are to be taken in their natural and ordinary sense, and

without any forced or subtle construction to extend their meaning."

If, in construing this sub-section, we apply this familiar rule of construction and take the words used by Congress in their ordinary sense, we soon reach the end of argument. Congress has said that the debt of this class which shall have priority is the debt which at "the date of the proceedings in bankruptcy" is *due to workmen*.

Thus, if we understand at all the ordinary meaning of these ordinary words, it is clear that Congress has seen fit to prescribe *two conditions* upon which priority under this sub-section will be given to a debt due by a bankrupt, and these two conditions are: it must be a debt due on account of *wages* and this debt must be *due to* a workman.

If the intent had been to prescribe only one condition, namely, that the debt need only be on account of wages, in such event, it seems to us, Congress would have said "wages of workmen, etc.," or "wages earned by workmen, etc." The limitation, however, of the right of priority to wages due to workmen seems to preclude the idea of wages not due to workmen but due to third persons.

That this is the natural and legitimate meaning of the language used by Congress in this sub-section, appears, we think, with mathematical certainty, from the following consideration: Under the Bankrupt Act no right to a lien or to a priority under any of the provisions of Section 64, attaches in favor of any person or in favor of any particular kind of debt, until "the date of the commencement of proceedings" in bankruptcy.

Therefore, prior to such date no workman can be said to have, by reason of the Bankrupt Act, a lien on account of any wages then due to him.

If, then, under such circumstances, there is at that time no lien attaching to this debt of wages due to workmen, it follows, of course, that there is no lien to pass with such wages when at such time they are assigned to a third person. Now, when, later, proceedings in bankruptcy are commenced, the Bankrupt Act, under Section 64, gives certain rights of

priority in favor of certain classes of claims and also in favor of certain classes of claimants. Some of these rights are to arise in futuro, namely, cost of administration, etc., while others attach by reason of the state of things *then existing.* This latter fact, the state of things existing at "the date of the commencement of proceedings" in bankruptcy, is, we submit, the test which determines the right to priority given under Section 64 (4). Taking this as the test, it seems to us to follow conclusively that no lien arises at that date except in favor of:

(1) Wages, "not to exceed $300 to each claimant;"

(2) "Which have been earned within three months before the date of the commencement of proceedings;" and,

(3) Which are *"due to workmen."*

If all the foregoing conditions exist at the date of the commencement of proceedings, the right to priority then attaches to the wages then due to workmen, and will pass with any *subsequent* assignment thereof; but as to wages assigned *prior* to the date of such proceedings, no right to priority arises, because, at the date of the assignment none existed, and, at the date of the proceedings in bankruptcy the only right to priority given is to wages then due to workmen.

III.

If, therefore, the words "wages due to workmen" are to be given a meaning the opposite of their natural import, it must be because the purpose and spirit of the Bankrupt Act so requires.

The *purpose* of the Act was two-fold—to enable honest insolvents to rid themselves of the burden of debt on condition that they surrender to their creditors all of their property; and, again, to enable creditors under certain conditions to compel insolvents to surrender all of their property for the benefit of the former. With this purpose in view, we find the *spirit* or dominant idea controlling the operation of this Act in the distribution of assets among creditors to be *equality.* Equality, then, is the *equity* of this Act

and from this rule the Act only departs when constrained by reasons of great necessity.

What was the necessity or reason that actuated Congress in giving priority to wages *due to workmen, clerks and servants?*

In the abstract, and without regard to holders, there are no degrees of merit between just debts. Debts for borrowed money, for supplies, for insurance, for salaries, or for wages are equally just and meritorious. All contribute equally to produce or protect the assets for distribution among creditors. If it be said that labor claims in themselves are meritorious because they have made possible the very property which is being distributed, it must be remembered that this result is equally due to the debt contracted for supplies, without which there would have been nothing for labor to work on.

If this be true, then it must follow that it is not the intrinsic *character* of the *debt* arising from the labor done by workmen, clerks and servants that gives birth to the necessity or reason which constrains Congress in this subsection to depart from the equity of equality and to give priority in favor of workmen, clerks and and servants. What, then, is the reason for the departure?

It seems to us it must be conceded that the reason, and the only reason, for this provision of the law is found in the conditions, personally and peculiarly applicable to the workman himself—his *necessities* and *helplessness.* Congress knew that as a rule the workman lives from hand to mouth and is rarely protected by surplus savings; hence, when in a proceeding in bankruptcy the operations of his employer are terminated, the workman finds himself without employment and without credit, and there is left him as the only resource, whereby may be supplied his immediate wants, the wages then *due to* him.

If under such circumstances the workman's wages are put upon a common footing with all other unsecured claims, want and suffering must certainly follow. Therefore, because of this helplessness of the workman and his family, and

to prevent as far as possible the suffering that must result to the workman from the loss of his meager earnings, Congress has provided that *"wages due to"* him, to a limited extent, shall have priority.

Thus is made apparent the reason impelling Congress to use the significant words, *"wages due to workmen, etc.,"* instead of *"wages earned by workmen, etc."* And this purpose —to give priority only to the wages *due* to workmen at the date proceedings in bankruptcy are instituted—becomes more apparent when we consider that the Act further limits this priority to a sum *"not to exceed three hundred dollars,"* and to wages *"which have been earned within three months, etc."* This further limitation is utterly inconsistent with the idea of an intention to favor a *class of debts* on account of any peculiar merit in them. On that theory there would be no reason for allowing part and disallowing part of the wages. It is, however, perfectly consistent with the idea that the priority is given, not to the *labor claim*, but to the *wage-earner*, for the purpose of relieving his distress. Accordingly, his debt not being, of *itself*, more meritorious than others, Congress has only protected enough of his wages to serve the purpose of the intended relief, and the balance of his claim is placed on the same basis with other just debts.

But neither in the letter nor the spirit of the Act do we find priority given to wages earned by workmen but *due to speculators* at the "date of the commencement of proceedings" in bankruptcy. The speculator has never been the object of the tender solicitude of the law. Indeed, it is common knowledge that around and about mining and manufacturing concerns this genus hovers to grow fat off the improvidence and the misfortunes of the laborer. The extent of the average profit resulting from this traffic is a scandal which is not mitigated by the fact that too often an official of the corporate employer is a secret sharer in the spoils. These things Congress knew, and, knowing them, it seems to us that Congress sought with apt language to indicate that in departing in this instance from that equity which is equality, it did so only in favor of *"wages due to workmen"*

and not in favor of wages *due to speculators.*

If in this we are correct, it follows that the intent and meaning of Sub-section 4, Section 64, is to give priority in favor only of a certain *class of persons* and not to a certain *class of debts,* and, therefore, an assignment of the debt prior to bankruptcy proceedings cannot give to the assignee a right to priority in payment.

It is thus seen that the *letter* of the law gives accurate expression to its *spirit,* and, that both will be violated by allowing priority to wages due an assignee where the assignment was made *prior* to "the date of the commencement of proceedings in bankruptcy."

IV.

We now desire to discuss the decisions of the Federal Courts in reference to this sub-section of our present Bankrupt Act.

Counsel for appellant reluctantly admit in their brief that the weight of such authority is on the negative side of the question. It will be found that some of the cases cited in counsels' brief have not the slightest application to the question certified, and, when reference is made to a case in point, the holding of the Court is so minimized as to be hardly recognizable.

We shall not encumber this brief with an unnecessary analysis of each of these cases, but will present what we believe to be a fair and judicial review of each and every reported case in which was determined the question at bar.

To secure this result, we beg to quote from the able opinion of D. L. Grayson, Esq., the Referee who decided the case below:

"Coming now to a discussion of the authorities under the present Act, we find the earliest decision to be the case of In Re Westlund et al., reported in 99 Fed. Rep., page 399, a decision by District Judge Lochren. In this case the petitioners were the owners by assignment of claims for labor performed for the bankrupt within three months before the date of the commencement of bankruptcy proceedings. Each

separate claim so assigned was for less than $300.00, which claims were duly filed by the petitioners, who claim the priority accorded by Section 64, B. 4 of the Act for wages due workmen, clerks or servants. Discussing this question, the court says: 'This language requires that a debt for wages to have priority must be due to the wage-earner; if the claimant entitled to priority might be an assignee, there would be no reason why such claims should be restricted to $300.00, as he might be the owner of several small claims, each less than that amount, but aggregating more. The clause referred to is intended to favor the class whose reliance for the maintenance of themselves and families is generally upon their wages as earned. There is nothing in the nature of security or lien for the payment of wages which could pass to an assignee. No right to priority arises or exists until the proceeding in bankruptcy is instituted, and then the wages assigned are not 'due to workmen, clerks or servants,' but to their assignees, and are outside the language of this clause. If debts for wages so assigned can be allowed priority, they may come in conflict or at least in competition with other claims for wages due and owing to the same workmen, clerks or servants earned within the same three months and lessen the payments, if the assets will not pay in full all debts having priority. It must be held, therefore, that debts of the bankrupt for labor and services which, at the commencement of the proceedings in bankruptcy are not due to workmen, clerks or servants, but to assignees, have no priority.'

"It will be at once noted that among the reasons offered by Judge Lochren for denying the right to priority we find the same reason offered by Judge Acheson in the Erie Rolling Mill Company case under the Act of 1867, to-wit., that claims in the hands of an assignee, if allowed priority, might come in conflict or at least in competition for other claims for wages due and owing to the same workmen, clerks or servants earned within the same three months and lessen the payments if the assets were not sufficient to pay in full the debts having priority. That is precisely what the effect would be in this case had not the assets exceeded the sum of $50,000,

for at the date of the filing of the petition in bankruptcy there was $44,000 due to workmen, clerks and servants of the bankrupt, and earned within three months prior to the bankruptcy which had not been assigned by them, in addition to the amounts assigned these petitioners, making something over $50,000 of wages in all.

"The next decision is the case of In Re Campbell, reported in 102 Fed. Rep. 688 by District Judge Seaman. In this case, however, the wages assigned were transferred subsequent to the commencement of the proceedings in bankruptcy, and the court states that it is unnecessary, therefore, to determine whether or not the decision of Judge Lochren in respect to assignments ante-dating the bankruptcy was correct; but the court rests its decision upon the proposition that claims being assigned after the bankruptcy were necessarily at the date thereof 'due to the workmen, clerks and servants,' and therefore necessarily embraced within the purview of the law.

"In the case of In Re North Carolina Car Company, reported in 127 Fed. Rep., page 178, it was held by District Judge Purnell that the provisions of Section 64, B. 4 were for the benefit of the wage-earner alone, and do not entitle a bank to priority for money advanced to the insolvent for the payment of pay rolls of such laborers which the insolvent agreed to assign to the bank. In discussing and construing this section, the court states: 'To give a claim priority under this section, it must be due the wage-earner; should such wage earner prove his claim and establish his priority, he could then assign it and the assignee would be subrogated to this priority; but, if assigned before being thus proven, the assignee would acquire no more right to priority than the assignee of any other unsecured debt. But it will be noted there was no privity between the wage-earner and the bank and there was no actual assignment. This section is discussed In Re Westlund; but in that case there was an actual assignment before the bankruptcy proceedings, and it was held that the assignee was not entitled to priority. There is nothing in the record to entitle the claimant to priority

and the claim, if allowed, must be as an unsecured one without priority.'

"In the case of In Re Harmon, reported in 128 Fed. Rep., page 170, it was held by both the referee and District Judge Keller that where it appeared that prior to the bankruptcy a large number of laborers holding claims for labor performed for the bankrupt assigned such claims to two of their number who were also laborers and who held claims of their own, in order to save costs in prosecuting suits against the bankrupt to recover such wages, the assignee agreeing to account to their assignors for the amounts due each one, that this did not deprive the claim so assigned of their right to priority. The district judge holds, in a very brief opinion, that the provision allowing these claims for labor performed within three months prior to the filing of the petition is regardless of the fact that they may have been assigned; and he offers as the sole reason for this opinion the fact that the statute, section 64, B. 4, uses the word 'claimant' instead of 'workmen.' But, in its vital facts, this case is totally different from either the Westlund case decided by Judge Lochren or the North Carolina Car Company case decided by Judge Purnell, both of which are in accord. It will be noted that while the claims allowed priority in this case were nominally assigned before the bankruptcy, yet the assignees held the same, not in their own right, but as trustees for the original holders, and for the express purpose only of facilitating their collection, the assignees acting merely as agents of the assignors for that purpose only. The referee himself stated in his opinion as one of the reasons for allowing the priority 'that the assignment is proved to be intended as and actually creating the assignees, Tucker and Sisley virtually merely trustees for the laborers.' As I view this case, therefore, in legal effect, and certainly if not at law, in equity, at least, all of these claims so assigned except those held by Tucker and Sisley in their own right for their own earning, they being fellow workmen, were still due at the date of the commencement of proceedings in bankruptcy to the assignors themselves, and hence were undoubtedly entitled to priority.

"There is quite a distinction to be made between the Westlund case in which the right to priority was asserted in favor of assignees who had acquired all right, title and interest of the wage-earners prior to the bankruptcy, and the facts of this case in which the assignees were only nominal and not actual owners of such claims, and for this reason, if for nothing more, I think this decision entitled to very little weight; nor do I think, furthermore, that the reason offered by Judge Keller for his view, that congress intended to prefer claims for labor performed within three months, and whether held by an assignee under an assignment prior or subsequent to the bankruptcy, is of much force. I do not consider that the word 'claimants' as used in the provision was intended to expressly or even impliedly include an assignee of the claim, but to prevent the useless repetition in the latter portion of the section of the words 'workmen, clerks or servants' used in the first sentence thereof; and, in my judgment, the word 'claimant' was only inserted therein to avoid the necessity of useless repetition of three several words defining the class of persons to whom priority was accorded.

"In the case of In Re Gurewitz, decided by the Circuit Court of Appeals of the Second Circuit and reported in 121 Fed. Rep. 982, it is held that a workman who is paid by the piece instead of by the day or by the month is also entitled to priority for his labor as accorded by this section. It is said: 'The legislative intent in the foregoing provision is manifest. It is to give a preference, limited in time and amount, to those employes of the bankrupt who worked for wages. It surely could not have been the purpose of Congress to make the method of computation the criterion of priority. * * * In order to secure priority under this section, the creditor must establish the following facts: First, that he was a workman, clerk or servant of the bankrupt; second, that he earned wages within three months prior to the commencement of proceedings.'

"Although this decision is, with respect to the particular question we have in hand, somewhat of an obiter dictum,

yet here is a clear intimation by this court that the creditor seeking priority must himself belong to the class accorded priority, and this, of course, is not true of the petitioners in this case.

"These are all of the decisions under the present act that have any bearing upon the questions before the court so far as I am advised, and I have been referred to no other."

See also:

Loveland, 276;
Collier, 503;
Brandenburg, 1043;
Cyc. Law & Proc., Vol. 5, p. 386.

We, therefore, submit that our proposition is sustained, namely, that the question certified "has been answered in the negative by every Federal Court that until now has had occasion to pass upon it."

V.

Finally, we desire to discuss briefly the authorities, State and Federal, mentioned in Appellants' brief, wherein the right to a lien of an assignee of wages is recognized and enforced under laws other than our present Bankrupt Act.

(1) In the first place, it is pointed out that it is now well recognized, where a railroad is sold under foreclosure proceedings, a preferential lien is accorded to wages earned by workmen within a period of six months next preceding the foreclosure proceedings, and, that this lien is good in favor of an assignee who takes by assignment made prior to such proceedings.

This is not only true as to wages, but it is true as to material furnished within the period. The equity underlying the principle is that the material thus furnished and the labor thus done have entered into and become a part of the property securing the mortgage bond and have actually worked a benefit to the bondholder.

Hence, the lien thus recognized is because of the *character* of the *debt* then created and not because of the character of the *claimant*.

Thus, in Railroad vs. Lamont, 69 Fed. 23, the Court, speaking of the lien thus given in favor of one who had provided waiting rooms for the company's passengers, office rooms for its ticket agents, etc., said:

"The right of preference is one that attaches to the *debt* and not to the *person* of the original creditor, consequently the right passes to an assignee of the debt."

We have never denied this proposition. But the question presented here is, whether or not in law priority is given under Section 64 (4) on account of the character of the debt earned by workmen or because of the *person* to whom the debt is due?

The case above mentioned is authority only for the proposition, that, if under Section 64 (4), the right to priority is given to the *debt*, this right will pass with the debt to an assignee.

To cite this and the many other cases as authority for the real question now presented is but begging the question.

(2) Again, appellants have pressed at much length the proposition that labor liens under State Statutes are assignable.

We do not deny this fact, but we submit that the cases cited can have no application here for several obvious reasons:

(a) The question here is not what the States have been pleased to do in the matter of their insolvency laws, but what Congress has actually done under the bankrupt law.

(b) In the next place, the purpose of State insolvency Statutes is materially different from that of our bankrupt law.

The State Statutes regulate the relative rights of employee and employer under all circumstances, and are passed by legislatures whose object is to make the pay of laborers prompt and secure while they work for going concerns as well as in cases of insolvency. But to impute such a purpose to Congress, is to ascribe to the Act a broader scope than any bankrupt law ever had or than is compatible with its very

nature. Such laws have to do only with the estates of insolvents.

Under ordinary circumstances, the laborer must look for protection to state laws, and the cases cited show that he has usually not looked in vain. But Congress proposed to enact a bankruptcy law. It proposed to give insolvents and their creditors the power, through the machinery of the United States Courts, to suddenly shut down the works of employers of labor and seize all their assets. In determining the conditions that should be imposed upon the exercise of this right, it was considered that to force needy laborers to await a tedious administration, and then receive a pro rata would entail real distress. To avoid this, Congress has said to creditor and debtor alike, that, whenever the benefits of the bankrupt law are invoked, one of the conditions upon which the courts of the United States will stop a going concern and administer an insolvent estate shall be that the hardship resulting to wage-earners shall be reduced to a minimum by paying wages which are *then due to workmen* and can be used to relieve their distress.

(c) Finally, it will be found that the language used in the State Statutes not only manifests a clear intent to give a preferential right in favor of wages because of the character of the debt and not of the claimant, but this other material difference exists, namely, that in none of these State Statutes, with one exception, is the lien, by express terms, limited to those *to whom wages shall be due* upon the happening of a given event.

But where the statute of a state, by its express terms, limits the lien given "to those to whom wages shall be due upon the happening of a given event," it will be found that an assignment of the wages, made prior to such event, does not carry with it a lien.

This point is illustrated in the New Jersey case, of which the Referee says:

"In the case of Delaware, Lackawanna & Western Railroad vs. Oxford Iron Co., reported in 6 Stewart, New Jersey Equity Reports, page 192, the following facts appear: Sec-

tion 63 of the New Jersey corporation act provides, 'In case of insolvency of any corporation, the laborers in the employ thereof shall have a lien upon the assets thereof for the amount of wages due them respectively, which shall be paid prior to any other debts of said company.' It appearing that some of the laborers had assigned their claims prior to the date of the insolvency of the Oxford Iron Company, and their assignees claiming priority, the court, construing this statute, said: 'Does the lien arise in favor of an assignee of a claim for wages who acquired his right prior to the date of insolvency fixed by the decree? The wages, to be within the operation of the statute, must be due to a person in the employ of the corporation at the time when it becomes insolvent; if prior to that time they are assigned so that when insolvency occurs they are not due to an employee, no lien arises. Such, I think, is the plain direction of the statute. The purpose of the statute is obvious. It is sometimes a matter of the utmost importance to the public that the business of an insolvent corporation should be kept in operation, and it is almost always true that the property of such bodies cannot be preserved unless they are kept up as going concerns. The statute was designed to accomplish both of these purposes, and to this end it was clearly necessary that the employees of a corporation in an insolvent condition, whose skill and labor was indispensable to the continuance of its operations, should be made secure for their wages. To enable an insolvent corporation to retain its employees is the primary object of the statute. Persons holding claims for wages who are not in the employ of the corporation at the time when it became insolvent are not, therefore, within its policy nor entitled to its protection. It is undoubtedly true that the assignment of a debt carries with it any security which the assignor holds; but when these assignments were made, the assignors had no lien or security; the right of lien arose subsequent, and though the assignors may still have been in the employ of the corporation when it became insolvent, the wages previously assigned were not due to them, but to persons not entitled to the character of employees.'

"I think the reasoning of this case, which, it will be noted, is in full accord with the reasoning given by Judge Lochren in the Westlund case, which was followed by Judge Purnell in the North Carolina Car Company case, and which is not, in my judgment, at all in conflict with the decision of Judge Keller in the Harmon case, is conclusive of the question. It has been well said that the bankrupt law gives no lien, in a strict legal sense, to workmen, clerks or servants; but that it merely gives them the right to priority of payment over general creditors. How could workmen, clerks or servants, prior to bankruptcy, be said to have any priority, lien or right (whatever we may choose to call it) which could be capable of assignment? The act itself creates the priority and the date the act fixes for it to take effect is the date of the commencement of proceedings in bankruptcy, which is the date of the filing of the petition. This statute is certainly sui generis, to the extent at least that it fixes its own method of distribution; and how a right to priority could be asserted based upon a transaction prior to the filing of the petition, I am unable to see. The bankrupt act deals with conditions as it finds them at the time the law is invoked; it is not retroactive in its operation except when expressly made so by certain provisions, such, for example, as that dealing with preferences. But the priority accorded by Section 64, B. 4, in my judgment, becomes fixed and of effect only at the date of the commencement of proceedings, and the status or right of the claimant to priority must be determined as the facts existed at that time. The right to priority depends upon a condition in presenti and not upon a condition either precedent or subsequent. Such, in my judgment, is the plain intent and meaning of the language used. If any other construction is placed upon this provision, the effect of it is to hold that whether or not the assignee of a claim for wages due to workmen, clerks or servants acquires any priority whatever over unsecured creditors must depend entirely upon an event subsequent to the date of the assignment under which he claims, which event, to-wit, the filing of a petition

in bankruptcy within three months thereafter, may or may not ever take place.

Being, therefore, of the opinion that prior to the filing of the petition and the commencement of proceedings thereby, the workman, clerk or servant has no priority to assign since he has no lien, but a mere preferential right which the law gives him merely because he belongs to a favored class, it must necessarily follow, if I am right in this conclusion, that these petitioners acquired no priority over unsecured creditors."

Upon appeal to the District Court at Chattanooga, Judge Clark, in affirming the Refree, said:

"The cases seem almost overwhelming against any other view than that contained in the ruling of the Referee."

Respectfully submitted,

GEORGE D. LANCASTER,
for Appellees.

JOHN P. TILLMAN,
J. H. BEAL,
of Counsel.

See 147 Fed. Rep., part 3, page 752. Dec. 13, 1906.